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(6)

No. 84-1313

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

RONALD L. COSBY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY OF ASSOCIATION OF AMERICAN RAILROADS TO OBJECTION TO MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

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April 12, 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

4 pp

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On March 18, 1985, the Association of American Railroads ("AAR") filed a Motion for Leave to File a Brief *Amicus Curiae* in support of the petition for a writ of certiorari in this proceeding. Respondents withheld consent to the filing of AAR's *amicus* brief, and have filed a document entitled Objection to Motion for Leave to File a Brief Amicus Curiae.[1] The arguments raised by respondents in that document are without merit.

Respondents assert that a brief *amicus curiae* supporting a petition for a writ of certiorari, and a motion for leave to file such a brief, must be filed *before* the filing of the brief opposing the petition. *See* Objection

[1] Respondents originally attempted to file their Objection in typewritten form. The Clerk of the Court noted receipt on March 28, 1985, and returned the papers for re-submission in printed form. *See* Letter from Alexander L. Stevas to Alex M. Lewandowski (March 28, 1985). The Clerk stated that the printed copies could be back-dated to March 28, 1985. *Id.* AAR received the printed version of the Objection on April 10, 1985.

to Motion for Leave to File a Brief Amicus Curiae at 2. This is plainly incorrect. Rule 36.1 of the Rules of the Supreme Court of the United States requires that a brief *amicus curiae*, and a motion for leave to file such a brief, must be filed "within the time allowed for the filing of . . . the brief in opposition to the petition for certiorari." The petition for a writ of certiorari in this matter was filed on February 15, 1985. Under Rule 22, the opposition to the petition was due thirty days later, on March 18, 1985.[2] Indeed, the cover of respondents' brief in opposition to the petition acknowledges this timetable with the following notation: "Due Date: March 18, 1985."

AAR filed and served its brief *amicus curiae* and motion on the day that briefs in opposition were due: March 18, 1985. The brief and motion were thereby timely filed under Rule 36.1. Respondents' mailing of their own brief three days early, on March 15, 1985, did not affect the timeliness of AAR's filing.

Respondents also assert that leave to file should be denied because AAR will not address points of law or factual arguments not already adequately presented by the parties, citing Rule 36.3. That rule, however, applies only to the filing of briefs *amicus curiae* "in a case before the Court for oral argument," not to briefs filed when the Court is still considering the petition for a writ of certiorari. Supreme Court Rule 36.3. Thus, the arguments made by respondents based on their reading of Rule 36.3 are inapplicable to this case in its current posture.

Indeed, it would be illogical to apply the provisions of Rule 36.3 to briefs *amicus curiae* filed pursuant to Rule 36.1, because petitions for certiorari (and oppositions)

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[2] The thirtieth day after February 15, 1985, was March 17, 1985. Because March 17 was a Sunday, however, the last day for the filing of the opposition became March 18, 1985. Supreme Court Rule 29.1.

are designed to stress why review should be granted rather than to analyze thoroughly the merits. *See* R. Stern & E. Gressman, Supreme Court Practice 497 (5th ed. 1978). While an *amicus* at the certiorari petition stage cannot anticipate the parties' treatment of the merits, it can call to the Court's attention the significance of a decision for which review is sought. That is what AAR seeks to do in this case.

AAR is uniquely qualified to comment on the potential impact of the decision below on industry-wide trends and conditions. As AAR stated in its motion, it has been actively involved in the interpretation of the railroad employee labor protection statute for nearly fifty years. AAR and various of its members are currently participating in judicial, administrative and legislative proceedings involving railroads and motor carriers that are potentially affected by the decision below. Those proceedings will substantially influence the structure of the evolving surface transportation industry for years to come. AAR submitted its brief *amicus curiae* in the belief that the information presented, developed from AAR's experience and broad perspective in the labor protection area, would be useful to the Court in evaluating the petition.

AAR respectfully requests that its motion for leave to file its brief *amicus curiae* be granted.

Respectfully submitted,

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